Supreme Court of the United States,

OCTOBER TERM, 1898.

KENT K. HAYDEN, as Receiver of the Capital National Bank of Lincoln, Nebraska, *against* GEORGE G. WILLIAMS and JOHN B. DODD.	No. 257.

BRIEF FOR THE DEFENDANTS.

Statement.

This case comes to this Court on a certificate from the United States Circuit Court of Appeals for the Second Circuit. The facts certified are as follows:

"The complainant is the Receiver of the Capital National Bank of Lincoln, Nebraska, which suspended payment in January, 1893, in a condition of hopeless insolvency. The stockholders, including the defendants, have been assessed to the full value of their respective holdings, but the money thus obtained added to the amount realized from the assets would not be sufficient even if all dividends paid during the bank's existence were repaid to the receiver to pay 75 per cent. of the claims of the bank's creditor's. This suit was brought to compel the repayment of and accounting for certain dividends paid by the bank to the defendants as holders of capital stock of the bank

of the par value of $5,000, on the ground alleged in the bill that each of said dividends was fraudulently declared and paid out of the capital of the bank and not out of net profits. A similar suit was brought against the stockholders resident in Nebraska, and upon appeal from a decree on demurrers was sustained by the Circuit Court of Appeals in the Eighth Circuit, defendants in that case conceding, by their demurrers, that the bank was insolvent when each dividend was paid.

The bank was organized in 1883 with a capital of $100,000, which was increased to $200,000 June 2, 1884, and to $300,000 July 21, 1886. The dividends which were paid from time to time were as follows:

DATE.	AMOUNT PAID IN DIVIDENDS.	DEFENDANT RECEIVED.
1885, Jan. 13	$15,000	$187.50
" July 14	13,000	162.50
1886, Jan. 12	16,000	200.
" July 13	14,000	175.
1887, Jan. 11	18,000	300.
" July 12	18,000	300.
1888, Jan. 10	18,000	300.
" July 10	18,000	300.
1889, Jan. 8	18,000	300.
" July 9	18,000	300.
1890, Jan. 14	15,000	250.
" July 11	15,000	250.
1891, Jan. 13	15,000	250.
" July 13	15,000	250.
1892, Jan. 12	15,000	250.
" July 12	12,000	250.

All dividends except the last were paid to the defendant Williams, a stockholder to the amount of $5,000, from the organization of the bank; the last dividend was paid to defendant Dodd, who bought Williams' stock and

had the same transferred to his own name December 16, 1891.

When the dividend of January 6, 1889, was declared and paid, and when each subsequent dividend down to and including July, 1891, was declared and paid, there were no net profits, the capital of the bank was impaired, and the dividends were paid out of capital, but the bank was still solvent.

When the dividends of January and July, 1892, were declared and paid, there were no net profits, the capital of the bank was lost and the bank actually insolvent.

The defendants, neither of whom was an officer or director, were ignorant of the financial condition of the bank, and received the dividends in good faith, relying on the officers of the bank and believing the dividends were coming out of profits."

Upon these facts the Circuit Court of Appeals requests the instruction of the Supreme Court concerning the following questions of law:

Can the receiver of a national bank recover a dividend paid not at all out of profits, but entirely out of capital, when the stockholders receiving such dividend acted in entire good faith, believing the same to be paid out of profits, and when the bank at the time such dividend was declared and paid was not insolvent?

Has a U. S. Circuit Court jurisdiction to entertain a bill in equity brought by the receiver of a national bank against stockholders to recover dividends which, it is claimed, were improperly paid, when such suit is brought against two or more stockholders and embraces two or more dividends, and when the objection that there is an adequate remedy at law is raised by the answer?

ARGUMENT.

FIRST.—As to the First Question.

I.

The Receiver cannot recover in the right of the bank, because the bank was never entitled to recover.

I.— *Where a solvent corporation has declared, apparently in the due course of business, a general dividend which is participated in by all the stockholders and received by them in good faith, such dividend is irrevocable, and the corporation cannot recover it back on any ground whatsoever.*

A corporate dividend is in one sense a partition of personal property among joint owners. Each stockholder is thereby deprived of the joint interest which he, through the medium of the corporation, has held in the whole fund, and receives as an exact equivalent his several shares. The mere declaration and payment of a dividend does not enrich the stockholder. This is shown by the fact that the market value of stocks upon which dividends are regularly paid, usually reflects the degree of proximity of the time of payment of the last or the next dividend.

The elementary principles which are applied by the Courts in cases where it is sought to disturb a partition of real or personal property or to obtain relief on the ground of mistake would, we submit, forbid any *several* obligation on the part of stockholders to repay dividends received in good faith.

In all such cases the defendant is entitled to be placed

in *statu quo*—to have restored to him the consideration upon which the division or payment was made.

This result could only be obtained in the case of a corporate dividend by a suit in equity against all the stockholders under these conditions: No transfers must have occurred or equities intervened, all of the stockholders must be solvent and all within one jurisdiction; and even then great hardships and inconveniences would be imposed in so many cases as to render such a remedy inequitable and unjust.

A shareholder cannot ascertain without expert assistance and great expense whether a dividend has really been earned or not. The dividend received and relied upon in good faith may constitute a substantial part or all of the yearly income of a person in moderate circumstances, in which case the reclamation might cause great distress and even ruin.

An executor or trustee might be compelled to repay dividends out of his own pocket after distribution of the estate or of the income. Other instances of hardship and inconvenience may be readily imagined.

It is, therefore, submitted that public policy requires that corporate dividends received in good faith should be irreclaimable.

A restoration of a portion of the dividends only will necessarily result in sheer injustice to some of the stockholders. A stockholder who has sold his stock should certainly not be compelled to contribute to the restoration of a fund in which only the existing shareholders are interested, nor should the transferee be required to repay dividends paid before the transfer, he having bought the stock in good faith relying upon the previous declaration of dividends as a practical certification by the directors and officers of a paid-up and unimpaired capital.

A bona fide purchaser of shares issued by a corporation

as fully paid up cannot be held liable to creditors, though the shares have not in fact been paid up.

Foreman *vs.* Bigelow, 4 Cliff., 508.
Steacey *vs.* Little Rock, &c., R.R. Co., 5 Dillon's C. C. Reports, 348.
3 Thomp. Corp., Sec. 2934.
Morawetz on Corp., Sec. 836.

If by reason of transfers of the stock, death, insolvency or absence from the jurisdiction of some of the stockholders, short statutes of limitations in some of the States, or any other cause, the whole fund cannot be restored, then the repayment by some of the stockholders of a part of the dividends will enure to the benefit of all of the stockholders and thus enrich some at the expense of others.

2. There is no authority for the recovery of dividends by a solvent corporation.

While there are cases where the receiver of an insolvent corporation has been allowed to recover from the stockholders diverted assets, we have been unable to find any case where the corporation itself has brought an action or suit against its stockholders to recover dividends.

II. *The provisions of the National Banking Act exclude any right of action or suit by a national bank to recover dividends on the ground of impairment of capital.*

1. The statute excludes any such right by making ample and complete provision for the restoration of impaired capitals.

"Sec. 5205. Every association which shall have failed "to pay up its capital stock, as required by law, and "every association whose capital stock shall have become "impaired by losses *or otherwise*, shall, within three "months after receiving notice thereof from the Comp-

" troller of the Currency, pay the deficiency in the
" capital stock, by assessment upon the shareholders
" *pro rata* for the amount of capital stock held
" by each; and the Treasurer of the United States
" shall withhold the interest upon all bonds held by him
" in trust for any such association, upon notification from
" the Comptroller of the Currency, until otherwise noti-
" fied by him. If any such association shall fail to pay
" up its capital stock, and shall refuse to go into liquida-
" tion, as provided by law, for three months after receiv-
" ing notice from the Comptroller, a receiver may be ap-
" pointed to close up the business of the association, ac-
" cording to the provisions of section fifty-two hundred
" and thirty-four.

" And provided, that if any shareholder or shareholders
" of such bank shall neglect or refuse, after three months'
" notice, to pay the assessments, as provided in this sec-
" tion, it shall be the duty of the board of directors to
" cause a sufficient amount of the capital stock of such
" shareholder or shareholders to be sold at public auction
" (after thirty days' notice shall be given by posting such
" notice of sale in the office of the bank, and by publish-
" ing such notice in a newspaper of the city or town in
" which the bank is located, or in a newspaper published
" nearest thereto), to make good the deficiency, and the
" balance, if any, shall be returned to such delinquent
" shareholder or shareholders."

Revised Statutes, § 5205, as amended by
Sec. 4 of Act of June 30, 1876 (chap. 156).

(Section 5141 provides for sale of stock of a shareholder who has failed to pay his subscription).

No personal liability or right of action is attached to the assessment under Section 5205, but the stock of a delinquent shareholder may be sold and the proceeds applied to the deficiency.

Section 5139 provides that every person becoming a shareholder by transfer "shall in proportion to his shares "succeed to all the rights and liabilities of the prior "holder of such shares."

These remedies apply to *all* cases of impairment including impairment by dividends.

An impairment is discovered by simply ascertaining the amount of present resources and liabilities. It should not then be the duty of the Comptroller to undertake the long and difficult task of investigating the accounts and valuing assets at times past in order to find out how much of the impairment has been caused by dividends, nor is it within his power to decide whether a shareholder is entitled to retain a certain dividend or not, that being a judicial function, but until these matters are ascertained and determined no assessment can be laid except for the whole deficiency.

A summary remedy is required and is intended. The Comptroller must determine at once, not only the existence, but the amount of the deficiency. The power to make one of these determinations necessarily includes the other. And these determinations are conclusive.

It is well settled that the Comptroller's determinations as to the deficiency calling for the assessment under Section 5151 and the amount of such deficiency are conclusive.

Kennedy *vs.* Gibson, 8 Wall., 498.
Casey *vs.* Galli, 94 U. S., 673, 680.

2. We contend that the shareholders of a national bank are entitled as matter of right, in case of any impairment, to have enforced the remedies provided by the charter, and no others.

The association has the option of restoring the capital by the *pro rata* assessment or of going into liquidation and must elect to do one or the other of these things.

The individual shareholder has no option, but must hold himself in readiness to meet and satisfy the onerous demands of the statutory remedies which may be set in motion at any mome[illegible] by the Comptroller of the Currency.

The only way in which he can protect himself is to call for the enforcement of those remedies.

To suspend the statutory remedies so that suits may be brought to recover the dividends (the bank meanwhile continuing in business with an impaired capital) would thwart the purpose of the statute to effect a speedy restoration of capital, endanger the interests of shareholders and creditors, and would be destructive of the rights of shareholders to equality of benefit and burden so carefully preserved by the statute.

Actions to recover dividends would be brought against those who received them, but the obligations under the charter are placed upon the shareholders for the time being, such obligations being shifted upon each transfer.

A shareholder repaying a dividend ought thereby to be discharged of all liability, but the attempt to restore the dividends by suit will inevitably result in a deficiency for which the assessment would be laid upon the shareholders who have repaid every dollar of their dividends. In such case the whole deficiency could be made good and the equal rights of the shareholders preserved only by ignoring the repayments and laying the assessment for the whole of the original deficiency and crediting the repayments on the assessments.

Again the association may vote to go into liquidation, in which case any shareholder who has repaid a dividend cannot reclaim it or have it offset against an assessment under Section 5151.

Delano *vs.* Butler, 118 U. S., 634.

But he would have just as completely discharged his liabilities if, like the other stockholders, he had never repaid a dollar.

It is submitted that the rights as well as the obligations of the shareholders are fixed by the statute, and that they cannot be changed or modified as they would be by the

enforcement of remedies other than those expressly provided.

3. The exclusive nature of the remedies provided in the Revised Statutes so far as concerns the matter of restoring impaired capitals of national banks may be further illustrated.

If an impairment existed by reason of the fact that some stockholder had not paid in his subscription, or because his note held by the bank had become bad paper under Section 5,204, or because the cashier of the bank had handed over to such stockholder a sum of money or other assets belonging to the bank, the restoration of the capital by the assessment under Section 5,205 would leave unaffected the liability of such stockholder.

In each of these cases there is a several liability upon contract express or implied which may still be enforced after the capital has been fully restored by new profits or by the voluntary assessment. But could a national bank after its capital has been restored by the voluntary assessment maintain a suit to recover dividends which caused the impairment when the repayment of such dividends would create a surplus which might with perfect propriety be immediately paid back to the stockholders?

4. The Bank could not have recovered the dividends upon the mere ground that the payment thereof was void.

(*a*) It is true that the statute strictly forbids the payment of dividends otherwise than out of net profits, but the same statute by plain and necessary implication forbids the recovery of any dividends by suit and excludes the very existence of any obligation to restore an impaired capital otherwise than by the summary and equitable mode therein provided. The payment of dividends impairing the capital casts the shareholders in obligations under the statute, and therefore such payment cannot be treated as of no effect.

(*b*) The statute (Section 5242) declares that payments to shareholders and creditors after an act of insolvency or in contemplation of insolvency shall be null and void; and *expressio unius est exclusio alterius.*

(*c*) It does not follow because an act is forbidden by law that it can have no valid consequences.

National banks are forbidden to incur liability beyond a prescribed limit; to loan money on real estate security or to loan money to one person or firm exceeding one-tenth of the capital stock; yet it is well settled that violations of these provisions do not render the transactions void, but only lay the bank open to proceedings by the Government for exercising powers not conferred by law.

> Thompson *vs.* St. Nicholas Nat. Bank, 146 U. S., 240.
>
> Gold Mining Co. *vs.* Nat. Bank, 96 U. S., 640.
>
> Weber *vs.* Spokane Nat. Bank, 64 Fed. Rep., 208.

(*d*) To hold that such dividends are utterly void according to an iron-clad rule, and that the money paid remains the property of the bank would involve consequences not intended by the statute. According to such view of the case the bank would hold two remedies. It could after a restoration of the capital by a *pro rata* assessment, bring actions and recover the dividends from all the recipients including those who are no longer members of the corporation and thus create a surplus to be divided among present shareholders, while any repayment of dividends *before* the *pro rata* assessment would reduce the amount of that assessment. Such hap-hazard results and inequalities are inconsistent with the whole spirit and purpose of the statute.

5. While the Bank remained solvent no action or suit could have been maintained by the bank or by any of the creditors to reach the dividends in the hands of the shareholders upon the trust fund theory.

The restoration would not have been for the benefit of the creditors, but for the benefit of the bank and its shareholders. The money would be put into the bank's business to be used for the benefit of the shareholders, and upon dissolution would presumably be divided among the shareholders, there being enough other assets to pay the creditors. It was for this very reason that this Court in the case of Delano *vs.* Butler (*supra*) refused to allow a shareholder of a national bank, who had voluntarily contributed to the restoration of an impaired capital, to offset the amount of such contribution against his assessment.

No creditor of the corporation could maintain any action or suit to reach the dividends so long as the bank remained solvent.

The case of Hollins *vs.* Brierfield Coal and Iron Company (151 U. S., 371), seems to us to be directly in point on the last proposition submitted, and to have the most important bearing upon this whole controversy.

This Court there held that simple contract creditors having no lien could not maintain a suit in equity to reach unpaid stock subscriptions. The plaintiff having claimed that as beneficiaries of a trust the creditors of a corporation could go into equity without first exhausting their legal remedies, the Court explained the trust theory applicable to the assets of a corporation. The Court, in its opinion, delivered by Mr. Justice Brewer, say:

" While it is true language has been frequently used to " the effect that the assets of a corporation are a trust " fund held by a corporation for the benefit of creditors, " this has not been to convey the idea that there is a di-

"rect and express trust attached to the property. As said "in 2 Pomeroy's Equity Jurisprudence, Sec. 1046, they "'are not in any true and complete sense trust, and can "'only be called so by way of analogy or metaphor.' To "the same effect are the decisions of this Court." And again: "In other words, and that is the idea which under-"lies all of these expressions in reference to 'trust' in con-"nection with the property of a corporation, the corpora-"tion is an entity distinct from its stockholders as from "its creditors. Solvent it hold its property as any in-"dividual holds his, free from the touch of a creditor "who has acquired no lien; free also from the touch of a "stockholder who though equitably interested in, has no "legal right to the property. Becoming insolvent the "equitable interest of the stockholders in the property, "together with their conditional liability to the creditors, "places the property in a condition of trust, first, for the "creditors, then for the stockholders. Whatever of "trust there is arises from the peculiar and diverse equit-"able rights of the stockholder as against the corporation "in its property and the conditional liability to its "creditors. It is rather a trust in the administration of "the assets after possession by a Court of Equity than a "trust attaching to the property as such for the direct "benefit of either creditor or stockholder."

II.

Complainant as Receiver has no better right to recover the dividends than the bank had and therefore cannot recover.

We are confident that we have established in our first point that the shareholders receiving the dividends in good faith could hold them by good title and right against the bank and its creditors and all the world, so long as the bank remained solvent. After an indefinite period of

time (indefinite because no statute of limitations would run until a right of action accrues), the bank becomes insolvent and a receiver is appointed. The proposition that such dividends can be recovered by the receiver even if the bank could not have recovered seems to be so plainly untenable as to require no argument to refute it.

III.

The dividends having been received in good faith and before insolvency cannot be recovered by the Receiver upon the theory or doctrine that the capital is a trust fund for the creditors.

We contend that the trust doctrine does not mean that the capital of a corporation is absolutely and strictly pledged to the creditors, as that would imply a lien or direct trust, which has been denied by this Court, but rather that the Courts will hold the shareholders to the exercise of good faith toward the creditors.

This view of the trust doctrine is, we believe, in harmony with all the authorities.

The Circuit Court decided in complainant's favor upon the authority of

> Hayden *vs.* Thompson, 71 Fed. Rep., 60; 36 U. S. App., 361, reversing Hayden *vs.* Thompson, 67 Fed. Rep., 273; and Finn *vs.* Brown, 142 U. S., 56.

Hayden *vs.* Thompson is a suit brought by the complainant against the Nebraska shareholders of the Capital Bank, the bill being a paraphrase of the bill in this suit;

but the decision was on demurrer, so that the allegations of fraud and insolvency as to all the dividends were taken as true, and the opinion of the Court shows that such allegations furnished the basis of its decision.

In Finn *vs*. Brown (*supra*) a dividend of twenty-five per cent. was declared twenty days before the bank suspended payments and when the bank was hopelessly insolvent. The defendant was not merely a stockholder, but was one of the directors and the Vice-President and acting cashier of the bank. The questions which the Court considered and passed upon were whether the defendant was a stockholder or not and whether a payment to the president of the bank of dividends received was a repayment to the bank.

Hence these two cases do not answer the question whether dividends paid by a *solvent* corporation can be recovered.

Nor do any of the cases where the trust fund principle has been maintained.

In nearly all of the cases, Federal and State, where the shareholders of a corporation have been required to restore money or assets of a corporation at the suit of or in behalf of creditors, the payment or transfer was made after insolvency or caused insolvency, and nearly all are cases of fraudulent transfers, where the shareholders were affected by notice.

Thus in Wood *vs*. Dummer (3 Mason's R., 308), the bank was in liquidation, its charter having expired and having been continued by statutory enactment from time to time solely to enable it to wind up its affairs and divide its capital stock. The bank simply undertook to pay the stockholders first. Dividends amounting to three-fourths of the capital stock were made. The other fourth had never been paid in. Heavy losses had been sustained, so

that the division left the bank insolvent. Notoriously the assets were held, not for the purpose of doing business or earning dividends, but solely for the purpose of liquidation. The Court held that the stockholders were affected both in law and fact by ample notice, and based the trust fund doctrine on the absence of individual liability of the shareholders.

Bank *vs.* Douglas (1 McCrary, 86). Defendant, who was a director of a construction company and a stockholder, assisted in the passage of a resolution allotting certain bonds among the stockholders, when only sixty per cent. of the capital stock had been paid in. Afterwards by resolution the same bonds were received in payment of an assessment on the stock. The allottment caused insolvency. It was held that the defendant was liable, having diverted to himself the funds which he held as a trustee.

Mumma *vs.* Potomac Co. (8 Peters, 281), involved the transfer of all the property and assets of a corporation on a reorganization.

In Curran *vs.* Arkansas (15 How., 304), the State of Arkansas having undertaken by legislation to withdraw certain assets from the Bank of the State of Arkansas, it was held that the State as a holder of the stock might withdraw the capital, but that as the bank was and had been *insolvent* there was no capital to withdraw.

Sawyer *vs.* Hoag (17 Wallace, 612). A shareholder nominally paying his stock subscription but receiving part back gave a note which was held to be in payment of his subscription and not to secure a loan, and that he could not offset a debt due him from the corporation against the note.

In Hornor *vs.* Henning (93 U. S., 228) it was held that

the amount for which the trustees of a corporation were liable under a statutory provision for incurring indebtedness beyond the amount of the capital stock was a fund for the benefit of all the creditors, and that one creditor could not alone maintain an action at law to enforce such liability.

Vose *vs.* Grant (15 Mass., 505) arose upon the same facts as Wood *vs.* Dummer (*supra*), Bartlett *vs.* Drew (57 N. Y., 587), and Hastings *vs.* Drew (76 N. Y., 9) were cases where the property of the corporation was sold and the proceeds divided among the stockholders. It was not pretended to be a division of profits and was in fact a wrongful conversion of corporate assets to the use of the stockholders as declared in Griffith *vs.* Mangam (73 N. Y., 611).

It is submitted that these cases furnish no support to the proposition that dividends ordinary in amount, paid apparently in due course by a solvent corporation and received in good faith, can be recovered. These cases all stand upon the fundamental principle of equity that the creditors of a corporation have, upon liquidation, the right to be paid in full before anything is paid to the shareholders, and that therefore if a corporation has become insolvent or if its charter has expired, or for any reason it is to be wound up, all of its assets and property are held upon trust for the creditors. Not only would a dividend after insolvency be a breach of this trust, but so would a transfer to shareholders by a solvent corporation of a substantial part of its property, causing insolvency and diminishing its assets below the amount required to pay the creditors. This fundamental principle would be applied to the case of a corporation not required by its charter to maintain a fixed capital. But if a corporation under such a charter should reduce its capital or restore one-half of

the original investment to the stockholders, leaving sufficient to pay all of its debts, and thereafter continue in business, would any principle of equity or law be thereby violated?

We also contend that the trust doctrine as upheld by the foregoing cases and especially as elucidated and defined by this Court in the case of Hollins *vs.* Brierfield Coal & Iron Co. (*supra*), is substantially and sufficiently embodied in the provisions of the National Banking Act, contained in Section 5,242, which provides that "all "deposits of money, bullion or other valuable thing for "its use, or for the use of any of its shareholders or "creditors; *and all payments of money to either*, made "after the commission of an act of insolvency, or in contemplation thereof, made with a view to prevent the "application of its assets in the manner prescribed by "this chapter * * * shall be utterly null and void."

The trust theory is further illustrated in the cases involving the stock subscription liability. Where that liability, express or implied, has once been created it is an asset of the corporation which must be preserved and any agreement between a corporation and its members cancelling or modifying the contract of subscripiion will be held void. But where a legal liability does not exist no liability can be predicated on the trust doctrine.

Clark *vs.* Bever, 139 U. S., 96.
Handley *vs.* Stutz, *Id.*, 417.

But a purchaser in *good faith* of shares issued by a corporation as fully paid up cannot be held liable to creditors, though the shares have not in fact been paid up.

Foreman *vs.* Bigelow, and other cases cited above at page 6.

An agreement to cancel or modify a stock subscription liability is an attempt not only to violate the charter, but

to annul the very obligations created by it. It is as if the directors should pass a resolution declaring a dividend payable expressly out of the capital and the Court should be asked to compel the payment of such a dividend. To say that the Court would refuse to give effect to such an agreement or resolution is very far from saying that a completed transaction will be overthrown and a right of action or suit given to recover dividends received in *good faith* and relied upon for years because there was a technical though unintentional violation of the statute.

A careful examination of the authorities will, we are confident, disclose this result: That the trust fund doctrine does not of itself furnish the ground of a recovery, it having only been applied in cases where there existed as the foundation of the action a right of recovery upon some fundamental principle, such as the equitable lien of creditors upon the assets of an insolvent corporation, a right of action on the ground of fraud committed by the defendant or the stock subscription liability.

Another limitation which appears to be justified is that the trust liability is not imposed on a shareholder without notice.

The importance of notice as affecting the rights of the stockholders must, we think, be conceded.

A national bank stockholder receiving dividends with knowledge that the capital is thereby impaired, knows that the promises implied by the charter requirements and upon which the public rely are being falsified. He may protect his own interests as well as those of the corporation and its creditors by appealing to the Comptroller of the Currency or by applying to a Court of Equity for an injunction. But a stockholder who receives unearned dividends in good faith, honestly believing them to be earned, instead of being a defrauder, is himself defrauded. Every dividend paid by a corporation is a certificate by

the officers and directors that the corporation is solvent, that its capital is unimpaired, and that it is earning profits. He also has a right to believe that in pursuance of law the bank's accounts are inspected by the official examiners, and its business conducted under the supervision of the Comptroller of the Currency. With all these assurances he not only may believe, but he has a perfect right to believe, himself lawfully entitled to the dividends. Relying upon these assurances, the holder goes on year by year regarding his stock as a valuable investment until it actually becomes a source of grievous injury. Relying upon the dividends he deals with the stock, selling or refusing to sell it, and perhaps foregoing opportunities of making other investments. Relying upon the dividends he is induced to continue in the relation of a shareholder, and incur the risk of being assessed to pay the claims of creditors, until at last he is assessed one hundred per cent. on the par value of his stock, and thus finds that by relying upon the dividends, as he had a right to do, he has sustained loss and damage in twice the amount of his original investment; and then it is proposed that the creditors are to have both the assessment and the dividends.

Should it be said that this stockholder has received the dividends *without consideration?*

" A dividend declared and paid after a proper investi-
" gation of the company's condition and the preparation
" of a balance sheet in good faith is irrevocable both as to
" the company and its creditors though it should after-
" wards turn out that the company was insolvent at the
" time when the dividend was declared."

Morawetz on Private Corporations, Sec. 446,
citing Stringer's Case, L.R., 4 Ch., 475.

Our contention that dividends paid out of the capital

but received in good faith may not be recovered is also supported by the following English cases.

In *re* Denham, 25 Ch. Div., 752.

Rance's Case, L.R., 6 Ch., 104.

IV.

The remedies provided by the national banking act are adequate, requiring the shareholders to do more than they would be required to do by the common law or by equity, and are exclusive of any other remedies, not only as to the bank, but as to the Receiver and creditors as well.

The Government may compel a bank with impaired capital to restore the capital or to cease to do business. The bank itself may assess the shareholders *pro rata* for the amount of any deficiency, however caused. And upon liquidation, if the capital is gone and the assets are insufficient to pay debts, the shareholders may, whether they have withdrawn the capital or not, be required to restore the capital once or so far as it may be required to discharge the debts. Thus in all cases of impairment the shareholders are treated as if they had withdrawn the capital, whether they have done so or not.

The defendants in this suit having paid the assessment of one hundred per cent. on the par value of the shares, have paid to the plaintiff for the use of the creditors in whose right he sues an amount exceeding the sum claimed in the bill, and have thus restored once their share of the capital.

But it is claimed that the liability imposed by Section 5151 is cumulative.

The answer to this is that any remedy which law or equity might give for the withdrawal of capital (in the absence of actual fraud or insolvency) or any liability or obligation which may be implied in such cases must be founded on the terms of the very statute containing the remedy which has been enforced. It is argued that these dividends ought to be restored because the creditors have a right to expect that the capital will be maintained, that promise being held out by the charter.

Carrying out this theory and viewing the charter requirements as promises held out to the creditors, the latter can ask or expect no more than the fulfillment of the provisions of the contract according to its terms, and the undertaking of the shareholders is to be gathered from the whole charter and not from a single section merely. That undertaking is not simply that no dividends shall be paid out of or which may impair the capital, but also that if the capital shall become impaired by losses *or otherwise* certain things will be done.

It was, no doubt, anticipated by Congress that in many instances latent impairments of capital might occur through the honest error of directors in valuing assets or through the failure of the officers to discover or report to the directors losses or embezzlements; and that in such cases dividends might be declared and received in good faith while the capital is impaired; and it is quite clear, we maintain, that it is intended in all such cases, no matter how the impairment is caused, to subject the shareholders to a continuing obligation to make good any deficiency of capital by a *pro rata assessment* and to enforce that obligation by a lien upon the stock, and that such lien shall follow the stock and that the obligation shall shift on each transfer and devolve upon the new holder.

Now, so far as the creditors are concerned, the promise held out by the charter is not absolutely that the capital

will be restored by the voluntary assessment, but that if any impairment occurs the capital will be restored or the bank will go into liquidation, and then the shareholders may be assessed one hundred per cent.

The shareholders are in no default; they have answered every call that has been made in pursuance of the statute, and having been treated by the statute as if they had withdrawn the capital, and having discharged the statutory liability, it is now proposed that a Court of Equity should treat them as if they had paid nothing. Because the payment was compelled by statute no equity is to be allowed on account of it, although it was for the benefit of the very creditors in whose behalf this suit is brought.

This is not a case where the statute has created certain obligations, and left to legal implication the remedies by which the obligations are to be enforced. The same statute (or contract) which creates the obligation to maintain the capital prescribes in a specific manner how the obligation is to be enforced, and what is to be done in every case of impairment, *and the implication of a promise to restore the capital in any other way is thereby excluded.*.

The whole undertaking of the shareholders is expressed in the charter—nothing is left to implication; and the remedies given by the charter constitute therefore the full measure of the obligations of the shareholders and of the rights of the creditors.

The rule that where a statute creates a new offense and denounces the penalty or gives a new right, and declares the remedy, the punishment or the remedy can be only that which the statute prescribes, has frequently been applied to corporate charters.

Farmers' &c. Nat. Bank *vs.* Dearing, 91 U. S., 29.
Fourth Nat. Bank *vs.* Francklyn, 120 U. S., 747.
Pollard *vs.* Bailey, 20 Wall., 520.
Lowery *vs.* Inman, 46 N. Y., 119.

If Section 5151 of the Revised Statutes had prior to 1884 been amended so as to limit the individual liability of the stockholders to cases of impairment of capital caused by withdrawal by the stockholders, and to the extent of such withdrawal, could this receiver after having enforced such liability maintain this suit and compel the shareholders to repay the dividends a second time? If not, then why should the larger and broader remedy given by the statute as it now stands be considered as cumulative?

By the common law the individual property of the stockholders was not liable for the debts of the corporation under any circumstances.

United States *vs.* Knox, 102 U. S., 422.

A statute imposing such liability should be strictly construed.

Douglass *vs.* Lewis, 131 U. S., 75.

It is submitted that it is not a strict construction of the statute which ascribes to Congress the intention that the obligation to maintain the capital and the liability to the creditors and the remedies given to enforce the same should be cumulative.

Where a national bank shareholder has committed no fraud, but has acted in entire good faith, he should be entitled to *some* protection and should not be subjected to any obligations except those expressly imposed by the statute.

V.

The statutes of the United States furnish the whole law of the case.

1. There is no common law of the United States. Each of the States may have its local usages, customs and com-

mon law. But there is no principle pervading the union and having the authority of law that is not embodied in the constitution or laws of the Union.

Wheaton *vs.* Peters, 8 Peters, 591, 658.
Smith *vs.* Alabama, 124 U. S., 465, 478.
United States *vs.* Hudson, 7 Cranch, 32.

2. While national banks in their dealings with the public may properly be subject to local laws and customs, it is evident that the internal affairs of such corporations and the rights and liabilities of their officers and stockholders can only be regulated by the laws of the sovereignty creating them.

3. The provisions of the Revised Statutes relating to national banks contain the whole law of the case because such was the intention of Congress.

The absence of any common law of the United States and the undesirability of leaving the internal affairs of national banks to the vicissitudes of local laws and usages furnished necessary occasion for a complete system of statute law determining the privileges, powers and duties of the corporation and its officers, and the rights and obligations of the shareholders, and providing all the remedies, civil and criminal, requisite for the enforcement of the Statute.

Apparently recognizing this necessity Congress has enacted just such a complete and comprehensive law, containing elaborate and careful provision, for the organization, government and regulation of national banks and for the winding up of their affairs on dissolution.

In support of this contention, we cite Cook County National Bank *vs.* United States (107 U. S., 445), where it was held that the act authorizing the formation of national banks constituted by itself a complete system for their establishment and government and that the provis-

ions requiring the deposit of security for their circulating notes and for a *pro rata* distribution of the assets in case of insolvency after the redemption of such notes, must be deemed to withdraw national banks from the provisions of the general statutes giving priority to the demands of the United States against insolvents.

SECOND.—As to the Second Question.

If complainant is entitled to recover any of the dividends the remedy is at law.

We maintain that the federal courts have no jurisdiction to entertain any action or suit against the stockholders of a national bank to recover dividends except upon the ground that the dividends were paid after an act of insolvency or in contemplation of insolvency, &c., in violation of Section 5242 of the Revised Statutes, and that if in such case only a money judgment can be had the remedy is at law.

If, as we have previously argued, the provisions of the Revised Statutes concerning national banks are exclusive and furnish the whole law of the case, the shareholders can be subjected to no obligations save those expressly set forth in the statute.

As long as the bank remains solvent, the shareholders, acting in good faith, retain their rights under section 5205. Acting as a body they have the right to elect whether they will restore the capital or go into liquidation. Actual fraud on their part being shown, a dividend might be declared void under section 5242, which was paid before insolvency. But when the bank becomes insolvent the shareholders lose their right to restore the

capital. The Comptroller may then appoint a receiver under the Act of June 30, 1876.

The statutory test of valid payments is not an arbitrary one, but is in accordance with justice and right principles, so that all cases where a recovery ought to be allowed can stand upon the statute.

Statutes making void all grants and alienations of goods and chattels made with intent to delay, hinder and defraud creditors are declaratory of the common law.

Sturtevant *vs.* Ballard, 9 Johns. (N.Y.), 337.

If any dividend was paid in violation of section 5242 of the Revised Statutes, or after insolvency, the payment being void under the statute, the legal right of the complainant to recover the money seems clear.

An action at law for money had and received is then the appropriate remedy.

Gaines *vs.* Miller, 111 U. S., 395.
Cary *vs.* Curtis, 3 Howard, 236, 246.
Litchfield *vs.* Ballou, 114 U. S., 190.
Pierson *vs.* McCurdy, 33 Hun, 520; affirmed on opinion of the Supreme Court in 100 N. Y., 608.
Chapman *vs.* Forbes, 123 N. Y., 532.
Roberts *vs.* Ely, 113 N. Y., 128.

No decree for contribution is required.

The liability, if it exists at all, is not conditional as in the case of the statutory liability to creditors under section 5151, but is absolute. The payment being "utterly null and void," under the statute any shareholder may be compelled to repay the whole amount received in a several action.

While the Comptroller of the Currency may direct the assessment under section 5151 without waiting for the

results of the process of collection (Kennedy *vs.* Gibson, 8 Wall., 498), it would seem that in the adjustment of the accounts the obligation to restore diverted assets should be treated as the prior liability. Also that a new shareholder who has not received the void dividends would be entitled to have all void payments restored, even if a surplus were thereby created, as he would be entitled to share in such surplus.

Hence the prayer of the bill for an accounting to ascertain the amount of the deficiency of assets under liabilities is as unnecessary as it is ineffectual.

The Court below has found that the assets, including the assessment and dividend, will be insufficient to pay the debts, but will this finding prevent the defendants from sharing in a surplus if on the final accounting there should prove to be one?

Complainant being entitled to maintain an action at law and recover the whole amount paid, there was no necessity for a resort to eqnity for any purpose of accounting or contribution.

This is not an action to enforce a trust.

The only decree that can be made in this suit is a decree for a sum of money.

Such a decree if rightly granted will not execute any trust but simply enforce a legal obligation. It is true that the money concerned is trust money, inasmuch as the complainant will hold the money upon a trust when he receives it.

But that trust will remain unexecuted until after the money is paid to the complainant. It was a breach of trust for the officers of the bank to pay the money if the payment was in contemplation of insolvency. So would it be a breach of trust for a testamentary trustee to pay out money belonging to the estate without considera-

tion. But would the action by the trustee to recover such money necessarily be an equity action?

This is not an action of accounting. The only account prayed for in the bill is one that is wholly unnecessary, and that could not be had because of the absence of necessary parties.

There is no question as to the payment of the dividends or as to the amount. The action is not *upon* an account. It is not to recover a balance of an account. The demands are liquidated. There is simply the question of fact; the dividends were paid in contemplation of insolvency or after insolvency, or they were not.

The fact being pleaded and established, recovery follows.

This is a common law action, because if any liability exists, such liability rests upon implied promise, hence the plaintiff cannot come into equity except to obtain some relief which only a Court of equity can grant.

Whatever features of an equitable character may be about the case or connected with it *the case itself* is a common law case.

The rule repeatedly declared by this Court is that "whenever a Court of law is competent to take cognizance of a right, and has power to proceed to a judgment which affords a plain, adequate and complete remedy, without the aid of a Court of equity, the plaintiff must proceed at law, because the defendant has a constitutional right to a trial by jury."

Buzard *vs.* Houston, 119 U. S., 347.
Whitehead *vs.* Shattuck, 138 U. S., 151.
Scott *vs.* Neely, 140 U. S., 106.
Insurance Co. *vs.* Bailey, 13 Wall., 616.
Fussell *vs.* Gregg, 113 U. S., 550.
Lewis *vs.* Cocks, 23 Wall., 466.

In Buzard *vs.* Houston the Court in its opinion, delivered by Mr. Justice Gray, said: "In cases of fraud or "mistake as under any other head of chancery jurisdiction, a Court of the United States will not sustain a bill "in equity to obtain only a decree for the payment of "money by way of damages, when the like amount can "be recovered at law in an action sounding in tort or for "money had and received."

It also seems to be well established that whatever exceptions may exist to the general rule they do not include a case where a court of equity is asked to give, or only can give relief of a legal nature. Thus Mr. Justice Field, writing the opinion of the Court in Whitehead *vs.* Shattuck (*supra*), said: "It would be difficult and perhaps impossible to state any general rule which would "determine in all cases what should be deemed a suit in "equity as distinguished from an action at law, for particular elements may enter into consideration which "would take the case from one court to the other; *but* "*this may be said that where the action is simply for the* "*recovery and possession ot specific real and personal* "*property, or for the recovery of a money judgment the* "*the action is one at law.*"

"Whenever a new right is granted by statute or a new "remedy for the violation of an old right, or whenever "such rights and remedies are dependent upon state "statutes or acts of Congress, the jurisdiction of such "cases as between the law side and the equity side of the "Federal Courts must be determined by the essential "character of the case, and unless it comes within some "of the recognized heads of equitable jurisdiction it must "be held to belong to the other."

Van Norden *vs.* Morton, 99 U. S., 378.

The federal courts will not compel the execution of a conveyance or render a decree to quiet title where ejectment would constitute an adequate remedy.

Whitehead *vs.* Shattuck (*supra*).
Lewis *vs.* Cocks (*supra*).

One who has an equitable title or right cannot obtain relief of a legal character in equity, on the ground that he cannot recover at law. To give a court of equity jurisdiction, the nature of the relief asked for must be equitable even when the suit is based on an equitable title.

Fussell *vs.* Gregg, 113 U. S., 550.
Smith *vs.* Bourbon Co., 127 U. S., 105.

A suit in equity cannot be maintained merely for an account of profits against an infringer of a patent; such relief ordinarily is incidental to some other equity, the right to enforce which secures to the patentee his standing in court.

Root *vs.* Railway Co., 105 U. S., 189.

Where money is loaned to a municipality in violation of law, if any liability on implied promise exists, that liability can only be enforced at law.

Litchfield *vs.* Ballou, 114 U. S., 190.

If any claim should be made that the remedy at law is inadequate, because the question of insolvency being in issue, the case cannot be conveniently tried before a jury, or because of any other difficulty, impediment or inconvenience in the prosecution of an action at law, we reply that this is a common law action, because the liability sought to be enforced rests upon implied promise, and that the case comes under the Seventh Amendment to the Constitution, which declares that suits in common law, where the value in controversy exceeds twenty dollars, the right of trial by jury shall be preserved, and that it would be entirely subversive of the constitutional provision for courts of equity to take jurisdiction of a common law case, and execute common law remedies, on the sole ground that the prosecution of the same remedies in courts of law would be

attended with difficulties; and that it would be especially obnoxious to the constitutional purpose to take such a case from the courts of law, on the ground that the remedy at law is inadequate, by reason of the mode of trial which is favored and preserved by the constitution.

If the first question should be answered in the affirmative, the right to recover the dividends paid out of capital would still rest upon implied promise, and the remedy would be at law, in accordance with the rules established by the cases above cited.

We have attached hereto a copy of the opinion of Judge Wheeler sustaining the demurrer in a suit brought in the District of Vermont by the complainant in this suit, the case not having been reported.

THEODORE DE WITT,
GEORGE G. DE WITT,
Counsel for the Defendants.

UNITED STATES CIRCUIT COURT,

District of Vermont.

Kent K. Hayden *vs.* Adna Brown *et al.*	In Equity.

The orator is Receiver appointed by the Comptroller of the Currency of the Capital National Bank of Lincoln, Nebraska, organized under the banking laws of the United States June 2, 1884, and in operation to January 23, 1893; and which declared and paid semi-annual dividends of six per cent. from December, 1886, to June, 1889; of five per cent. from thence to December, 1891; and of four per cent. June, 1892. Some of the defendants were severally shareholders during all this time, and partook of all these dividends, and the rest were during a part of the time, and partook of the dividends while they were shareholders. This bill is brought to recover these dividends as made from the capital stock, against all the shareholders in this district; and is demurred to for misjoinder of the defendants; for adequacy of remedy at law, and for want of equity.

That dividends made from the actual capital of corporations needed to pay debts are recoverable back is elementary; and that they may be recovered by a bill in equity, brought against all who can be reached, where the corporation is situated, to wind up its affairs seems clear; but proceedings, brought elsewhere, merely for the collection of the money lack the grounds for equitable relief on

which such bills are usually maintained. In Finn *vs.* Brown, 142 U. S., 56, an action at law was upheld and tried by jury for the recovery from a shareholder of such a dividend. This shows that claims against shareholders for the recovery merely of the money are distinctly several; and also that Receivers of national banks have a full, adequate and complete remedy at law for the collection of such claims when nothing more is sought. No fraud of these shareholders about these dividends is alleged; nor knowledge even of dividends from anything but profits is charged, beyond the general allegation that "the oft-repeated fact" of such dividends was well and long known to many of the defendants, without saying which dividends or to which defendants.

This falls far short of any fair allegation of anything that any particular defendant would be called upon to answer for discovery of any ground for relief.

Nothing is sought but the money, which if recoverable a judgment at law would bring.

The claim that the dividends were made from capital stock are founded upon allegations that the expense account was large, and great losses were sustained, so that there were no net earnings or clear profits from which to make dividends; and that this situation was concealed from the Comptroller of the Currency and the creditors. These allegations are not inconsistent with the carrying on of the business in regular course according to the laws of the United States; nor contrary to the disappearance of net earnings and profits through depreciation of assets apparently good. Dividends from apparent net profits, made in due course according to law, cannot very well be said to be divisions of capital, although based upon assets which turn out so poorly as to show now that there were in fact no profits at all to be divided; especially after such long acquiescence (Witters *vs.* Sowles, 31 Fed. Rep., 1).

The loss from such shrinkage may as justly, perhaps, fall upon the bank as upon the shareholders.

Demurrer sustained.

HOYT H. WHEELER.

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For Plaintiff.

DANIEL ROBERTS,
For Defendants.